UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

TransColorado Gas Transmission Company Docket No. RP05-216-001

ORDER ON REHEARING

(Issued July 26, 2005)

1. On May 10, 2005, the Commission issued an order in this proceeding accepting an annual Fuel Gas Reimbursement Percentage (FGRP) report filed by TransColorado Gas Transmission Company (TransColorado).[1] On June 9, 2004, Indicated Shippers[2] submitted a request for rehearing of the May 10, 2005 Order. As discussed below, the Commission denies the rehearing request.

Background

2. On March 1, 2005, TransColorado submitted its annual FGRP report for the year ended December 31, 2004 (March 1 filing), pursuant to section 12.9(b) of the General Terms and Conditions (GT&C) of its tariff. This report reflected proposed variance adjustments to be effective for the period April 1, 2005 through March 31, 2006, and included work papers to support the adjustments to its Fuel Use and Loss (FL&U) percentages.

3. TransColorado's Fuel Gas Reimbursement tariff provisions require an annual report to be filed on March 1 of each year to provide monthly information for the twelve months ended the prior December 31 and to establish a variance adjustment to be effective for the twelve months beginning April 1. In accordance with section 154.403 of

[1] *TransColorado Gas Transmission Co.*, 111 FERC ¶ 61,208 (2005) (May 10, 2005 Order).

[2] Indicated Shippers are BP Energy Company, BP America Production Company and Chevron Natural Gas, a division of Chevron U.S.A., Inc.

the Commission's regulations,[3] TransColorado's tariff provides for in-kind fuel gas reimbursement for gas consumed in transmission system operations and for FL&U, through the use of FGRP.

4. In the March 1 filing, TransColorado stated that it determined in 2004 that, due to an accounting error, linepack purchases had been inadvertently accounted for as shipper deliveries. This error resulted in the understatement of actual FL&U quantities in calendar years 2001, 2002, and 2003, which in turn meant that the variance adjustments placed into effect on April 1, 2002, 2003 and 2004 did not reflect the proper amount of FL&U. TransColorado had corrected these accounting errors and adjusted its unamortized balance of FL&U in the period ending December 31, 2004. These adjusted FL&U amounts were then used to calculate the FGRP variance adjustment to be applicable during the period from April 1, 2005 through March 31, 2006.

5. In the May 10, 2005 Order, Commission accepted TransColorado's filing with the proposed accounting adjustments, effective April 1, 2005. In reviewing TransColordo's tariff, the Commission concluded that the tariff provision taken as a whole did not expressly bar such a recovery. The Commission allowed the pipeline to recover its actual, corrected FL&U costs as part of its annual fuel reconciliation report, to ensure that the actual quantity of FL&U gas was recovered. Since the actual quantities of FL&U gas used was not disputed, and there was no basis in equity for denying recovery, the Commission allowed the accounting adjustments sought by TransColorado as lawfully recoverable under the tariff.

Request for Rehearing

6. Indicated Shippers seek rehearing of the May 10, 2005 Order granting the fuel adjustments sought by TransColorado. They assert that the Commission erred by allowing TransColorado to recover the FL&U costs associated with the 2001 through 2003 time period. Indicated Shippers state that the 173,702 Dth that TransColorado seeks to recover amounts to $1.1 million.[4]

7. Indicated Shippers argue that TransColorado's tariff should be narrowly interpreted to permit adjustments to reconcile discrepancies between fuel costs and fuel recovery only during the prior calendar year. Based on this interpretation, Indicated

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[3] 18 C.F.R. § 154.403 (2005).

[4] Indicated Shippers' Request for Rehearing at 1. Since the shipper-producers reimburse fuel costs in-kind, the Commission is not examining the reasonableness of the Indicated Shippers valuation methodology, but is merely using the approximately $1.1 million figure for purposes of discussion.

Shippers claim that TransColorado's accounting adjustments are unlawful, in that they violate the filed rate doctrine under section 4(e) of the Natural Gas Act (NGA), which prohibits retroactive rate making. This doctrine is implicated if the tariff provision does not permit the proposed accounting adjustment. Indicated Shippers argue that the rules of contract interpretation support their interpretation of the tariff, as barring these prior period adjustments.[5] Indicated Shippers also argue that the Commission's approach in allowing the accounting adjustments is bad policy that ignores the Commission's "duty to protect shippers from excessive charges"[6] under the NGA.

8. Finally, Indicated Shippers again assert that it would be inequitable for them to pay the adjusted FGRP because it would amount to an intergenerational inequity on expansion shippers that may not have been using the system when the accounting errors occurred.

Discussion

Tariff Provision

9. The Commission finds that although the tariff provision at issue is not a model of clarity, permitting TransColorado's prior period adjustment is consistent with Commission policy and TransColorado's tariff. Accordingly, as discussed below, the Commission denies Indicated Shippers' rehearing request.

10. Section 12.9 of TransColorado's tariff states:

> TransColorado shall have *the right to adjust* the FGRP *to reflect the actual quantity of gas used* by TransColorado so as not to create an imbalance on its system. The FGRP for Phase I and Phase II shippers will include two components: (1) lost or gained and unaccounted-for quantities, and (2) prior 12-months ending December 31 variance adjustment, that includes

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[5] They allege that the Commission "reads out" the one-year limit on true-up provision in TransColorado's tariff, and that a specific contract clause should prevail over a general clause. As discussed below, this approach would "read out" the general clause, and ignore the fact that the tariff interpretation sounds not only in contract but in a regulatory context.

[6] Citing the line of traditional cases for that proposition. Missing from this analysis, however, is consideration of cases that support a pipeline's recovery of its costs, so long as they are just and reasonable, because to do otherwise would be unconstitutionally confiscatory. *See, e.g., Transcontinental Gas Pipeline Corp. v. FPC,* 171. 518 F.2d 459 (D.C. Cir. 1975), *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944), *FPC v. Natural Gas Pipeline Co,* 315 U.S. 575 (1942).

unamortized or over-amortized quantities from the preceding April 1 through March 31 12-month amortization period.[7] [Emphasis added]

As indicated above, TransColorado's tariff is intended to provide a true-up mechanism to reconcile actual gas used and lost so as not to over-recover or under-recover FL&U costs. The tariff provision provides the legal basis for the cost recovery at issue here. As understood by the Commission, the provision, taken as a whole, ensures that TransColorado recovers its FL&U costs while the annual variance reconciliation ensures that the customers are only charged actual costs. Where the customer base changes, equitable considerations must also be weighed, as discussed below.

Legal and Policy Analysis

11. As stated in the May 10, 2005 Order, use of an adjustment to correct a past error that resulted in an under-recovery (or over-recovery) of FL&U is consistent with Commission precedent. It is also consistent with the very nature of fuel tracking mechanisms, which always require some adjustments for prior periods. The issue here is whether the tariff language, taken as a whole, provides notice that an adjustment for periods before the current 12-month amortization period might be allowed. In other words, whether the annualized adjustment language is an absolute bar to any other adjustment for prior periods, however reasonable. Although the Commission may have in the past more narrowly circumscribed a pipeline's right to recover prior period FL&U costs on various grounds, most recently, the Commission has applied a two-part test. Pipelines can recover FL&U costs if the underlying tariff can be read to permit FL&U recovery, and if the pipeline establishes that the losses are the type of losses for which recovery was contemplated and demonstrates with reasonable accuracy the amount of the adjustment it seeks to recover.[8] So long as the Commission's findings are reasonable under such an approach, there is no violation of the filed rate doctrine or the rule against retroactive rate making because the shippers are on notice that the pipeline is entitled to recover these costs.[9]

12. In *Mississippi River Transmission Corp.* (MRT), the pipeline sought to recover prior period adjustments resulting from the operation of faulty valves and equipment. In spite of MRT's tariff language that defined a 12-month recovery period for the FL&U,

[7] Original Sheet No. 247, to FERC Gas Tariff, First Revised Vol. No. 1.

[8] *See Miss. River Transmission Corp.*, 96 FERC ¶ 61,185 at 61,817 and 95 FERC ¶ 61,323, at 62,146 (2001) (MRT).

[9] *Id*. 95 FERC ¶ 61,323, at 62,146 (citing *Natural Gas Clearinghouse v. FERC,* 965 FERC F.2d 1066, 1075 (D.C. Cir. 1992)).

the Commission determined that there was no bar against prior period recovery in the tariff. Instead, we concluded that MRT had sufficiently notified its customers of such recovery by including a general language indicating that the pipeline will adjust for actual usage: "Fuel Use and Loss Percentages under MRT's rate schedules shall be adjusted upward or downward on an annual basis to reflect actual fuel usage, and lost or unaccounted-for gas."[10] In light of such a provision, the Commission found that the fuel adjustment was intended to track fuel use and that neither MRT nor its customers "expected to gain or lose based on the operation of the fuel tracker."[11]

13. Similar to MRT, TransColorado's tariff includes a general language in section 12.9 intended to prevent any imbalances on the system by reflecting the actual quantity of gas used. The Indicated Shippers do not dispute that an accounting error caused linepack purchases to be inadvertently booked as deliveries of gas. Given this fact, if an adjustment were not permitted, TransColorado would not be recovering its actual FL&U, which it has the right to do under the tariff.

14. Thus, TransColorado's tariff put shippers on notice that its fuel and lost and unaccounted-for gas costs were to be recovered. For that reason, when TransColorado discovered its accounting error in 2004, TransColorado corrected its FL&U account to properly reflect the quantities that should have been included as FL&U in the variance adjustments in 2001, 2002 and 2003 but were not. Corrections for accounting errors that are not part of the prior 12-month variance adjustment but relate to an earlier period, are reasonably booked during the relevant 12-month period in which they are discovered, in order to ensure that all FL&U is recovered as required by the tariff.

15. Moreover, contrary to Indicated Shippers' argument, Commission determination in *Williams Gas Pipelines Central, Inc. (Williams)* is distinguishable from the present proceeding.[12] In *Williams,* the Commission found that the tariff language contained an explicit bar against prior period fuel adjustment because it provided that the revised fuel and lost reimbursement percentages shall be "based on actuals for the preceding twelve

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[10] *MRT*, 96 FERC ¶ 61,185, 61816 and 95 FERC ¶ 61,323, 62,143.

[11] Commission found MRT's tariff provision to be ambiguous in light the Commission's findings in *Transco* and *Williams*. The Commission also concluded that there was a factual dispute regarding MRT's losses for under-recovery. Based on these issues, the Commission ordered an evidentiary hearing. *See MRT*, 96 FERC ¶ 61,185 and 95 FERC ¶ 61,323 (2001).

[12] *See Williams Gas Pipelines Central, Inc.,* 89 FERC ¶ 61,332 (1999), *order on reh'g*, 91 FERC ¶ 61,015 (2000) (*Williams*).

month period ended September 30."[13] The Commission held that the tariff only authorized Williams to make a fuel reimbursement filing on December 1 "to recover fuels costs only for the prior twelve months ending September 30." TransColorado's tariff, however, does not tie the "actuals" to the same sentence as the annual reconciliation. Moreover, the reference to the right to adjust for actual quantities of gas used is broader than the Williams language, and not as limiting. Even though the tariff language in Williams may have some similarity to TransColorado's, we find the accounting adjustments permissible under TransColorado's section 12.9 of GT&C. The Commission has moved from the more narrow parsing of FL&U provisions as in *Williams*, to a more multi-factor approach in *MRT*, *Transco*, and other recent cases where there was some ambiguity in the tariff, and where the prior period adjustments were reasonable and justified.

16. In addition to the two prong *MRT* test, the Commission announced in *Transcontinental Gas Pipe Line Corp.* (*Transco*)[14] that recovery would not be permitted if the pipeline (1) had deliberately created the undercollections, (2) had been grossly negligent in the management of its system and thereby caused the fuel use differential, or (3) had waited an inordinate amount of time after discovery of the error to seek recovery.[15] We do not find that any of these grounds preclude or limit TransColorado's recovery since TransColorado's tariff permits it to recover the actual quantity of fuel used, and TransColorado demonstrated with reasonable accuracy the amount of the adjustment it seeks to recover. Moreover, there is no claim by Indicated Shippers that any deliberate or negligent action by TransColorado has caused this under-recovery. Finally, TransColorado has not delayed its request for recovery, but instead made a timely request in the first FGRP filing it submitted after discovering and correcting the accounting error.

17. The Commission also disagrees with Indicated Shippers' assertions that we are violating contract principles to misconstrue the tariff language, and ignoring extrinsic evidence or prior precedent. The many cases cited by Indicated Shippers concerning management fees, NAESB standards, and contract issues are not on point. To some degree the tariff language here was a creature of the Commission's making as well as the pipeline's, since the Commission directed a true-up provision be filed when TransColorado changed from a monthly to annual FGRP. There is, however, some

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[13] *Id.* at P 61,057.

[14] *Transcontinental Gas Pipe Line Corp.*, 93 FERC ¶ 61,114 (2000), *order on reh'g*, 95 FERC ¶ 61,299 (2001) (*Transco*).

[15] *Transco*, 95 FERC ¶ 61,299 at 62,021.

ambiguity in the tariff provision, and no settlement or other "legislative history" to aid in interpretation. Nor does the interpretation sound entirely in contract, since there are regulatory policies at play -- both those ensuring customers are protected, and those intended to allow a pipeline to recover reasonable costs so as to avoid confiscation of its property. Our approval here is consistent with our weighing of these policies, and the Commission's reading of how this tariff language should be applied in the circumstances.

18. Indicated Shippers argue that because the NGA imposes a duty to protect customers from excessive rates the subject tariff could be interpreted to permit a refund to customers of a prior period overcollection, but the tariff should not be interpreted to allow any prior period adjustment for undercollection, as a goad to prudent management. While this is a policy approach that could be chosen, the Commission has consistently addressed under- and over-collections of fuel gas more flexibly, on a case by case basis, to be able also to address situations where a prudent pipeline would not recover its reasonable costs unless allowed a prior period adjustment to correct for booking or metering errors. It would be inconsistent not to apply that more flexible policy here, where the Commission also finds that the "right to adjust" language in section 12.9 of the tariff provides notice of, and supports the undercollection adjustment in this case.

Equitable Analysis

19. Furthermore, as stated in the May 10, 2005 Order, we find any intergenerational inequity *de minimis.*[16] Indicated Shippers do not challenge this, but assert they will be disproportionately affected as expansion shippers. We find that permitting TransColorado's proposed accounting adjustment not inequitable even if Indicated Shippers are now using the system more than they have in prior years. The adjustment amount will be recovered from *all shippers*, not just Indicated Shippers, and the amount on a per Dth basis is much smaller than Indicated Shippers originally asserted. TransColorado seeks only to apply its tariff to correct for an under-recovery of FL&U, and a shipper generally takes the pipeline's tariff structure and charges thereunder as it finds them. If an overcollection in past years were currently being adjusted, current shippers would be entitled to receive its benefit. Thus, there is no inequity or unreasonably disproportionate imposition of burden by the Commission's decision here.

20. Accordingly, the Commission is affirming the May 10, 2005 Order and denying rehearing.

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[16] The impact of the prior period adjustment is not five cents per Dth as alleged by Indicated Shippers but less than one-half of one cent per Dth, according to TransColorado. *See* TransColorado's Answer at 12. Indicated Shippers have not challenged this finding in their request for rehearing.

Commission orders:

Indicated Shippers' Request for Rehearing is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.